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No. 07-499

IN THE
Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,
Petitioner,

v.

MICHAEL B. MUKASEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR SCHOLARS OF INTERNATIONAL REFUGEE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Immigration and Nationality Act bars granting asylum or withholding of removal to a person who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

The question presented is whether those "persecutor bars" apply to a person whose allegedly disqualifying conduct was coerced.

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INTEREST OF THE *AMICI CURIAE*

Amici are legal scholars who have studied and published on the status and rights of refugees under U.S. and international law, on exclusion from refugee status, and on international criminal law. *Amici* have a strong interest in ensuring that U.S. law is interpreted in a manner consistent with the international obligations of the United States. *Amici* further have a strong interest in ensuring that States adhering to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol do not apply those instruments in contradictory ways, but rather give them full and consistent ef-

fect with respect to all persons who seek refuge within their borders. This Court has previously consulted the conclusions of leading scholars interpreting those instruments. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439-440 & n.44 (1987); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 (1993).[1]

Deborah Anker is the author of the leading treatise on comparative U.S. and international refugee law, *Law of Asylum in the United States* (3d ed. 1999). She is a Clinical Professor of Law at Harvard Law School and Director of the Harvard Immigration and Refugee Clinical Program. Professor Anker has authored numerous publications on international law, refugee law, and U.S. immigration law. Her works have been cited by this Court and are frequently cited by courts in the United States and other countries. She has served as a legal advisor and trainer on refugee issues to the United Nations High Commissioner for Refugees (UNHCR) and the U.S. Department of Justice.

Geoff Gilbert is Editor-in-Chief of the *International Journal of Refugee Law*, the leading journal in the field of refugee law. He is Professor of Law in the University of Essex Department of Law and a scholar of international human rights law, international refugee law, and international criminal law. Professor Gilbert is the author of *Responding to International Crime* (2006) and was commissioned by the UNHCR to write

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[1] This brief is accompanied by letters from each party consenting to its filing. No counsel for any party authored this brief in whole or in part; no party or counsel for any party made any monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici* and their counsel made any such monetary contribution.

the Global Consultation paper on Exclusion from Refugee Status for the fiftieth anniversary of the 1951 Convention. He has served as an advisor to the UNHCR, the Organization for Security and Cooperation in Europe, and the Council of Europe in matters of refugee law, terrorism, and human rights.

Guy S. Goodwin-Gill is Founding Editor of the *International Journal of Refugee Law* and author (with Jane McAdam) of a leading treatise in refugee law, *The Refugee in International Law* (3d ed. 2007). Professor Goodwin-Gill is currently a Senior Research Fellow at All Souls College and Professor of International Refugee Law at the University of Oxford. He is a scholar of public international law, with a particular interest in immigration, refugees and asylum, human rights, and international humanitarian law. Professor Goodwin-Gill's other books include *Child Soldiers: The Role of Children in Armed Conflict* (1994) (with Ilene Cohn). He has been regularly cited by the highest courts of several jurisdictions, including this Court in prior refugee law cases.

James C. Hathaway is author of two leading refugee law treatises, *The Law of Refugee Status* (1991) and *The Rights of Refugees Under International Law* (2005). He is the Dean and the Hearn Chair in Law of the University of Melbourne Law School. Prior to joining the University of Melbourne, Professor Hathaway was the James E. and Sarah A. Degan Professor of Law at the University of Michigan Law School, and Director of its Program in Refugee and Asylum Law. He directs the Refugee Caselaw Site, a project that collects, indexes, and publishes leading judgments on refugee law. Professor Hathaway's works have been frequently cited by high courts in several countries, in-

cluding the House of Lords, the Supreme Court of Canada, and the High Court of Australia.

David A. Martin is coauthor of leading casebooks in the field of immigration and refugee law: *Immigration and Citizenship: Process and Policy* (6th ed. 2008), and *Forced Migration: Law and Policy* (2007). Professor Martin is the Warner-Booker Distinguished Professor of International Law at the University of Virginia School of Law. He served as General Counsel of the U.S. Immigration and Naturalization Service from 1995 to 1998. Professor Martin has also advised the U.S. government in immigration and refugee matters, including a 1993 Department of Justice consultancy that led to major reforms of the U.S. asylum system and a 2003-2004 Department of State study on improving the U.S. overseas refugee admissions program.

Jane McAdam is co-author (with Guy S. Goodwin-Gill) of a leading treatise on refugee law, *The Refugee in International Law* (3d ed. 2007). She is a Senior Lecturer in the Faculty of Law at the University of New South Wales in Sydney and Director of its International Law Programs. Her publications include *Complementary Protection in International Refugee Law* (2007) and *Forced Migration, Human Rights and Security* (2008). Dr. McAdam is the Associate Rapporteur of the Convention Refugee Status and Subsidiary Protection Working Party for the International Association of Refugee Law Judges and editor of the *Refugee Survey Quarterly*'s issue on the sixtieth anniversary of the Universal Declaration of Human Rights.

SUMMARY OF THE ARGUMENT

The Immigration and Nationality Act (INA) allows persons to seek refuge in the United States if they fear persecution in their home country on account of race, religion, nationality, membership in a particular social group, or political opinion. An applicant who meets the above standard—known as a "refugee" (8 U.S.C. § 1101(a)(42)(A))—may seek a discretionary grant of asylum (*see id.* § 1158(b)(1)(A)) and may also be eligible for a mandatory withholding of removal (*see id.* § 1231(b)(3)).

Asylum, withholding of removal, and the U.S. refugee definition are each subject to "persecutor bars," which foreclose relief to applicants who, though facing persecution themselves if removed, previously "ordered, incited, assisted, or otherwise participated in" persecution of others on account of one of the protected grounds. 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

In this case, both the Board of Immigration Appeals (BIA) and the court of appeals held that the "persecutor bars" forbid a grant of asylum or withholding of removal even if the applicant's conduct was the result of coercion. The BIA held that "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution…. [I]t is the objective effect of an alien's actions which is controlling." Pet. App. 6a (internal quotation marks omitted). The court of appeals likewise held that "whether an alien was compelled to assist authorities is irrelevant." *Id.* 2a.

The decisions below erred in two respects. First, they failed to give meaning to the words "ordered, incited, assisted, or otherwise participated in," all of

which incorporate concepts of criminal culpability and exculpatory defenses.

Second, the BIA ignored Congress's intent that the persecutor bars conform to the United States' obligations under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267, which incorporates most of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The INA's persecutor bars parallel the exclusion in Article 1F(a) of the Convention, which makes clear that individual culpability is highly relevant—and indeed must be established—before a person facing persecution may be denied safe haven. The practice of other States Parties to the Refugee Protocol and Convention uniformly recognizes a duress defense to the persecutor exception. The Convention's drafting history and the well-established norms of international criminal responsibility that the Convention incorporates by reference similarly require consideration of duress.

The Refugee Protocol—and therefore, the INA—requires at a minimum that an applicant not be subject to the persecutor bars where (a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; and (c) the remedy was not disproportionate to the evil. The Protocol and the INA may also provide greater protection, but even this minimum standard requires reversal of the court of appeals' judgment in this case, which did not permit consideration of culpability at all.

ARGUMENT

I. THE INA'S "PERSECUTOR BARS" REQUIRE CONSIDERATION OF INDIVIDUAL CULPABILITY AND THE DEFENSE OF DURESS

This case turns on the interpretation of three virtually identical sections of the INA that forbid treating as a "refugee"—and relatedly bar from asylum and withholding of removal—anyone who (1) "ordered, incited, assisted, or otherwise participated in" (2) "the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42) (refugee definition), 1158(b)(2)(A)(i) (asylum), 1231(b)(3)(B)(i) (withholding of removal).[2]

A. The Plain Text Of The INA's Persecutor Bars Requires Consideration Of Individual Culpability And Well-Established Exculpatory Defenses

As with any statute, interpretation of the INA begins with its text. The words "persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" track language in the general eligibility provisions governing asylum and withholding of removal. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). "[P]ersecution … on account of" a protected ground has thus been interpreted consistently across the eligibility

[2] In a slight and immaterial variation, the withholding provision excludes applicants who have "ordered, incited, assisted, or otherwise participated in the persecution of *an individual because of the individual's* race, religion, nationality, membership in a particular social group, or political opinion" (emphasis added).

and persecutor bar provisions. *See, e.g.*, *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988) (citing interpretations of the refugee definition's "on account of" element in applying a persecutor bar); *Matter of Fuentes*, 19 I. & N. Dec. 658, 661-662 (BIA 1988) (declining to construe "persecution" broadly for eligibility purposes because it would expand the persecutor bar); *see also Jiang* v. *BCIS*, 520 F.3d 132, 135-136 (2d Cir. 2008) (vacating BIA decision and noting as "troubling" the BIA's treatment of particular conduct as "persecution" under the persecutor bar but not as "persecution" under eligibility provisions).

To implicate the persecutor bars, however, it is not enough that "persecution" for a protected reason have occurred. The applicant must additionally have "ordered, incited, assisted, or otherwise participated in" the persecution. *E.g.*, 8 U.S.C. § 1101(a)(42). These words distinguish the persecutor bars markedly from the eligibility provisions governing asylum and withholding of removal, which do not turn on whether an individual actor could be said to have "ordered, incited, assisted, or otherwise participated in" the harm in question. Thus, while an asylum applicant may demonstrate a well-founded fear of "persecution" without proving the culpability or subjective intent of the person who harmed him, application of the "persecutor bars" requires more.[3]

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[3] The purpose of the U.S. and international refugee protection regimes is to provide protection, not to punish or rebuke. *See, e.g.*, Hathaway, *The Rights of Refugees Under International Law* 4-5 (2005); Anker, *Law of Asylum in the United States* 284 (3d ed. 1999). The focus of refugee law is thus on the predicament of the person facing persecution, who is not required to establish the culpability or subjective intent of those committing the harm. *See,*

The BIA decision below, which considered only the objective existence of "persecution," effectively read the additional language out of the persecutor bar provisions. This Court has long recognized the duty to "'give effect, if possible, to every clause and word of a statute.'" *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

The additional words in the persecutor bars incorporate concepts of individual culpability that, at a minimum, require consideration of intent and related exculpatory defenses. Two of the additional verbs—"ordered" and "incited"—call for an overt manifestation

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e.g., *Pitcherskaia* v. *INS*, 118 F.3d 641, 647 (9th Cir. 1990) ("That the persecutor inflicts the suffering or harm in an attempt to elicit information, for his own sadistic pleasure, to 'cure' his victim, or to 'save his soul' is irrelevant.... Motive of the alleged persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her 'on account of' a characteristic or perceived characteristic of the alien." (internal citations and footnote omitted)); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365-367 (BIA 1996) ("[M]any of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution." (citing *Matter of Kulle*, 19 I. & N. Dec. 318 (BIA 1985), and *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985))); *see generally* Anker, *Law of Asylum in the United States* 281-285 (discussing subjective intent and its relationship to the eligibility provisions' requirement of persecution "on account of" a protected ground).

of intent. *See Black's Law Dictionary* 777, 1129 (8th ed. 2004) (defining "order" as "command" and "incite" as "[t]o provoke or stir up (someone to commit a criminal act, or the criminal act itself). Cf. abet."). The notion of having "assisted" in a wrongful act similarly correlates with the criminal law. *See* 18 U.S.C. § 2(a) (providing criminal liability for "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission"); *Central Bank, N.A.* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994) ("aiding and abetting" is generally understood as providing knowing aid to persons committing a wrongful act with the intention of facilitating the act); *United States* v. *Williams*, 341 U.S. 58, 64 (1951) ("aiding and abetting" means to assist in perpetration of a crime). By the principle of *ejusdem generis*, the "otherwise participated" language in the persecutor bars should also be understood to require *culpable* participation. Indeed, the BIA has already invoked principles of criminal and accessorial liability in determining that an applicant "participated in the persecution of others." *Matter of McMullen*, 19 I. & N. Dec. 90, 96 (BIA 1984) (noting that the Charter of the International Military Tribunal extended criminal liability to "accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes" and that the applicant's voluntary assistance to a terrorist organization made him complicit in its acts (internal quotation marks omitted)).

The criminal law concepts invoked in the INA's persecutor bars thus require adjudicators to look beyond the objective effect of conduct and to consider culpability. *See, e.g., Morissette* v. *United States*, 342 U.S. 246, 274 (1952) ("'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt

there must be not only a wrongful act, but a criminal intention.'" (quoting *People* v. *Flack*, 125 N.Y. 324, 334 (1891))). Consideration of culpability also incorporates common defenses to criminal liability, including duress. *Cf. Dixon* v. *United States*, 548 U.S. 1, 12-13 & n.7 (2006) (noting that even absent codification of affirmative defenses, the Court has assumed their availability when interpreting federal criminal statutes). The INA's persecutor bars should accordingly be construed to include such a defense.

B. The Persecutor Bars Must Be Read Consistently With U.S. Obligations Under The Refugee Protocol

The requirement of culpability and availability of a duress defense are confirmed when one "'look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *Dada* v. *Mukasey*, 2008 WL 2404066, at *9 (U.S. June 16, 2008) (quoting *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991)); *see also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)).

The "persecutor bars" at issue here, enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, are inextricably linked to, and must be interpreted in light of, the United States' obligations under two important international instruments. *See* United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 ("Refugee Protocol"); United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("Refugee Convention").

Following the humanitarian crisis of the Holocaust and the Second World War, the Member States of the United Nations drafted the Refugee Convention to ensure that persons facing persecution in their home countries could find refuge elsewhere. The Convention defined "refugee" as, *inter alia*, a person who:

> [a]s a result of events occurring before 1 January 1951[4] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention art. 1A(2).

The Convention obligated States Parties to afford refugees certain protections, the most important of which is *nonrefoulement*,[5] which is "[a] refugee's right not to be expelled from one state to another … where his or her life or liberty would be threatened." *Black's*

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[4] The Convention allowed State Parties to interpret "events occurring before 1 January 1951" to mean either "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951." Art. 1B.

[5] "*Nonrefoulement*" derives from the French verb "*refouler*," meaning "to drive back." *See* Goodwin-Gill & McAdam, *The Refugee in International Law* 201 (3d ed. 2007); Hathaway, *The Rights of Refugees Under International Law* 349.

Law Dictionary 1083; *see also* Refugee Convention art. 33(1) ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179-180 (1993) (discussing *nonrefoulement*).

In 1967, the Refugee Protocol expanded the Convention's protections by incorporating Articles 2 through 34 of the Convention by reference and striking the geographic and temporal restrictions from its definition of "refugee." Refugee Protocol art. 1(1)-(3). Although the United States did not sign the Refugee Convention itself, it acceded to the Protocol in 1968 and, by doing so, obligated itself to recognize qualified persons as refugees and "to comply with the substantive provisions of Articles 2 through 34 of the [Refugee Convention]." *INS* v. *Stevic*, 467 U.S. 407, 416 (1984).

Congress enacted the Refugee Act of 1980 specifically to comply with the United States' obligations under the Convention and Protocol. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1986), the Court observed that there is "abundant evidence" that one of Congress's primary purposes in passing the Refugee Act "was to bring United States refugee law into conformance with the [Protocol]." *Id.* at 432, 436-437; *see also INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). Indeed, Congress transcribed the Convention's definition of "refugee" into the Act with only minor variations and modified the remedy of "withholding of deportation"—now known as "restriction on removal" (8 U.S.C. § 1231(b)(3)) or "withholding of removal" (8 C.F.R. § 208.1(a))—to comply with the United States' Convention obligation of *nonrefoulement*. *See Cardoza-*

Fonseca, 480 U.S. at 429 & n.7, 440-441; *Stevic*, 467 U.S. at 421 ("Section 203(e) of the Refugee Act of 1980 amended the language of [the withholding of deportation provision], basically conforming it to the language of Article 33 of the United Nations Protocol.").

Legislative history further confirms Congress's intent that the Refugee Act comport with the Protocol. Both the House and Senate committee reports, as well as the conference committee report accompanying the final Act, contain statements that the Act's provisions are intended to conform to the Protocol. *See* H.R. Conf. Rep. No. 96-781, at 19-20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160-161 (adopting the "internationally-accepted definition of refugee contained in the U.N. Convention and Protocol" and noting that the withholding of removal provision is to be "construed consistent with the Protocol"); H.R. Rep. No. 96-608, at 9-10 (1979) (stating that the Act will "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the [Convention and Protocol]" and noting that the Act's persecutor bar "is consistent with the U.N. Convention"); S. Rep. No. 96-256 at 4, 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144, 149 (stating that the Act's refugee definition "will bring United States law into conformity with our international treaty obligations" and provide relief "to those who qualify under the terms of the United Nations Protocol"); *see generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981); Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Y.B. Int'l Legal Stud. 91.

In addition to voicing a general intent that the Refugee Act conform to the Protocol, Congress also indicated that the persecutor bars at issue here be inter-

preted consistently with the corresponding provisions in the Refugee Convention. The Convention's Article 1F specifies particular people who, though they may otherwise qualify as "refugees," cannot avail themselves of the protection of that status:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The first version of the Refugee Act to contain the persecutor bar as a limitation on the definition of "refugee" was a House Judiciary Committee amendment that was later adopted by the full House. *See* 125 Cong. Rec. 37198, 37199 (1979) (quoting H.R. 2816, 96th Cong., § 201(a) (1979), as amended). The Judiciary Committee described the statutory bar as embodying the same exception "provided in the Convention relating to aliens who have themselves participated in persecution." H.R. Rep. No. 96-608, at 18. The Judiciary Committee specifically quoted Article 1F(a) of the Convention:

> The Committee Amendment also adds language specifically to exclude from the definition of "refugee" those who themselves engaged in persecution. This is consistent with the U.N. Convention (which does not apply to those who,

> *inter alia*, "committed a crime against peace, a war crime, or a crime against humanity"), and with the two special statutory enactments under which refugees were admitted to this country after World War II, the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953.

Id. at 10.[6] The House's amended withholding of deportation provision also had a persecutor bar, which was worded identically to the bar in the definition of "refugee." *See* 125 Cong. Rec. 37200 (quoting H.R. 2816, 96th Cong., § 203(e), as amended).

In drafting the final version of the Act, the Conference Committee adopted the House bill's definition of "refugee" and its withholding of deportation provision. *See* H.R. Conf. Rep. No. 96-781 at 19-20, *reprinted in* 1980 U.S.C.C.A.N at 160-161. The Conference Committee specifically observed that the House bill "incorporated the U.N. definition" of "refugee." *Id.* at 19, *reprinted in* 1980 U.S.C.C.A.N at 160. With regard to the withholding provision and its exceptions, the Conference Committee adopted the House version "with the understanding that it is based *directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol*." H.R. Conf. Rep. No. 96-781 at 20, *reprinted in* 1980 U.S.C.C.A.N at 161 (emphasis added).

The final Refugee Act accordingly provided for "four specific conditions" under which an otherwise-

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[6] The Committee's observation that the persecutor bar "is consistent with the U.N. Convention … and with … the Displaced Persons Act of 1948" was prior to this Court's interpretation of the 1948 Act exclusion clause in *Fedorenko* v. *United States*, 449 U.S. 490 (1981).

qualified applicant could be deported notwithstanding the principle of *nonrefoulement*—grounds that match "those set forth in the aforementioned international agreements." H.R. Conf. Rep. No. 96-781 at 20, *reprinted in* 1980 U.S.C.C.A.N at 160-161. The first exclusion in the Act was the persecutor bar at issue here (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(A))), which corresponds to the Convention's exclusion for persons who "committed a crime against peace, a war crime, or a crime against humanity." *See* H.R. Rep. No. 96-608, at 10; Refugee Convention art. 1F(a). The other three exclusions also derive from the Convention: "danger to the community" following conviction of "a particularly serious crime" (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(B)); Refugee Convention art. 33(2)); "serious reasons for considering that the alien has committed a serious nonpolitical crime" outside the United States prior to the alien's arrival (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(C)); Refugee Convention art. 1F(b)); and "reasonable grounds for regarding the alien as a danger to the security of the United States" (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(D)); Refugee Convention art. 33(2)). The Refugee Act thus incorporated both the Convention's Article 1F and its Article 33(2) exclusions from protection. Although the structure and wording of the Refugee Act and the Refugee Convention do not always match, the congruence of their provisions is evident.[7]

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[7] The Act did not specifically reference persons "guilty of acts contrary to the purposes and principles of the United Nations." Refugee Convention art. 1F(c). Congress may have considered it sufficiently covered by the persecutor bars at issue in this case. *See* Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(A)). Indeed, when pointing out the persecutor bars' consistency with the

In addition to the "abundant evidence" in its legislative history, the Refugee Act's conformity with the Protocol is further confirmed by the rule presuming that acts of Congress are consistent with U.S. treaty obligations. Courts do not interpret statutes to repudiate U.S. treaty obligations absent a clear statement by Congress manifesting such an intent. *See Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252

Convention, the House report noted that the Convention did not apply to persons who, "*inter alia*," committed a crime against peace, a war crime, or a crime against humanity as provided in Article 1F(a). H.R. Rep. No. 96-608, at 10. The report's use of "*inter alia*"—considered in view of the Convention's structure and the other exclusions specified in the Refugee Act—suggests that Congress may have meant the persecutor bars to encompass both Articles 1F(a) and 1F(c). Alternatively, "*inter alia*" may have simply been a rhetorical reference to other exclusions.

For purposes of this case, it does not matter whether the Refugee Act's persecutor bar covered Article 1F(c) as well as 1F(a) since, as discussed below (pp. 22-24), both articles require consideration of personal culpability. Moreover, the text, drafting history, and state practice strongly suggest that Article 1F(c) is either coterminous with Articles 1F(a) and 1F(b), or can apply independently only to (1) state officials in positions of authority (and under some interpretations only those in the highest position of policy-making or executive authority), (2) individuals with a high degree of involvement in serious human rights violations, and (3) persons who commit terrorism-related acts (which could also be a basis of exclusion under Articles 1F(a), 1F(b), or 33(2) of the Convention). *See* Goodwin-Gill & McAdam, *The Refugee in International Law* 189-190 (reviewing the drafting history of Article 1F(c) together with the practice of States Parties and relevant U.N. instruments); Hathaway, *The Law of Refugee Status* 226-229 (1991) (discussing various interpretations and concluding that Article 1F(c)'s application should be limited to government officials "who have exploited their political authority to jeopardize the well-being of individuals").

(1984) (reiterating the "firm and obviously sound" clear statement principle and noting that "[l]egislative silence is not sufficient to abrogate a treaty" (citing *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982))); *Cook* v. *United States*, 288 U.S. 102, 120 (1933) (a treaty will not be considered "abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed"); *Restatement (Third) of the Foreign Relations Law of the United State* § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *cf. Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

The Refugee Act contains no clear statement abrogating the Protocol or purporting to depart from it. On the contrary, as discussed, Congress repeatedly stated its intent to legislate in conformity with the Protocol. And none of the subsequent amendments to the INA's asylum and withholding of removal provisions contains any clear statement suggesting that the persecutor bars are to be interpreted contrary to U.S. obligations under the Protocol.[8]

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[8] The only subsequent legislation involving the persecutor bars was a 1996 revision that rearranged and amended the asylum and withholding provisions but did not materially alter the language of the persecutor bars. *See* Pub. L. No. 104-208, tit. 6, § 305(a)(3), 110 Stat. 3009, 3009-602 (1996) (adding 8 U.S.C. § 231(b)(3)(A)) (varying the persecutor bar's language from "on account of" to "because of" as part of a broader rewrite of the withholding provision); *id.* § 604(a), 110 Stat. at 3009-691 (adding

Accordingly, in construing the persecutor bars in the INA, this Court should give strong interpretive weight to the *nonrefoulement* principle and the limited exceptions thereto in the Refugee Convention and Protocol. As the following section demonstrates, those provisions warrant reversal of the court of appeals' judgment in this case.

C. The Refugee Convention And Protocol Require The United States To Consider Individual Culpability In Applying A Persecutor Bar

The text, purpose, and history of the Convention, as well as its interpretation by other States Parties, demonstrate that conduct performed under duress that is therefore not culpable—even though potentially describable as "persecution" in terms of its effect on a victim—is not a basis for denying an applicant the benefit of *nonrefoulement*.

Interpretation of an international treaty, like that of a statute, begins with the words used, which are given their "ordinary meaning as understood in the public law of nations." *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931) (internal quotation marks omitted). The Court may also "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943); *see also* Vienna Convention on the Law of Treaties art. 31(1), 1155 U.N.T.S. 331 (1969) (treaty terms "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

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8 U.S.C. § 1158(b)(2)(A)) (matching the Refugee Act language in a redraft of the asylum provision).

treaty in their context and in the light of its object and purpose"); *id.* art. 31(3)(b) (permitting recourse to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 325.

This Court has noted the importance of court decisions of other States Parties in interpreting a treaty. *See Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (finding the "'opinions of our sister signatories to be entitled to considerable weight'" (quoting *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978))); *see also El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 173-176 (1999) (citing case law of other signatory countries in construing Warsaw Convention); *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223, 227-228 (1996) (same); *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 536-537 (1995) (declining to interpret a statute in a manner contrary to the practice of other countries under an international convention); *cf. Olympic Airways* v. *Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.").

All of the relevant interpretive sources demonstrate that Article 1F of the Refugee Convention only allows denial of *nonrefoulement* protection when the applicant engages in persecutory conduct with *culpable intent*, not when the conduct is coerced.

1. The text of Article 1F and its context in the Convention demonstrate the relevance of culpability

Article 1F's terms make clear that its persecutor bar includes consideration of culpability and defenses thereto. The exclusions of Article 1F all refer to "crime" or "guilt," concepts that necessarily include some form of culpable conduct or mens rea. Refugee Convention art. 1F(a) ("committed a crime against peace, a war crime, or a crime against humanity"); *id.* art. 1F(b) ("committed a serious non-political crime outside the country of refuge prior to his admission"); *id.* art. 1F(c) ("guilty of acts contrary to the purposes and principles of the United Nations"). Article 1F thus centers not solely on the objective effect of the conduct specified, but also evokes criminal law principles that implicate individual culpability for wrongful acts, as well as defenses to such culpability. *See supra* pp. 8-11 (citing cases).

Other articles in the Convention demonstrate that its drafters knew how to specify when the objective effect of conduct or circumstances would be determinative, regardless of intent or culpability. Articles 1D (pertaining to persons already receiving protection) and 1E (pertaining to persons firmly resettled in a third country) center on objective circumstances, without addressing the individual's fault or faultlessness in bringing about those circumstances. Article 33(2), which permits expulsion of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is," similarly focuses on objective effects: it does not require culpability for acts harming national security, but simply a threat posed.

The context and purpose of the Convention and Protocol confirm the relevance of culpability. The Refugee Convention arose from the United Nations' "profound concern for refugees and endeavour[] to assure refugees the widest possible exercise of the[ir] fundamental rights and freedoms." Convention, pmbl. The Convention's purpose is to establish an international protection regime ensuring the security, legal protection, and human dignity of individuals victimized by persecution. *See* Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretations; a Commentary* 6-8 (1953); Hathaway, *The Rights of Refugees Under International Law* 4-5 (2005). The purpose and context of the Convention indicate that exceptions to its protections—and especially exceptions to the protection of *nonrefoulement*—should be construed narrowly. *See* Gilbert, *Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law* 427-429 (Feller *et al.*, eds., 2003); *cf. City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995) (exceptions to the general policy and purpose of a statute should be narrowly construed); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953) (a remedial law "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results").

Narrow construction of exceptions to *nonrefoulement* is particularly justified given the inherently grave consequences if an otherwise-qualified individual is forced back to a country where he or she faces severe harm or death. This Court's general rule resolving any ambiguity in deportation provisions in favor of the noncitizen should apply with special force when the result of deportation will be persecution. *See Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) ("because deportation is

a drastic measure," deportation provisions are strictly construed in favor of the noncitizen).

The drafting history confirms Article 1F's focus on excluding *culpable* individuals, namely criminals whose conduct subjected them to extradition or international criminal proceedings and whose unworthiness would weaken public support for the refugee regime. *See* Gilbert, *Current Issues in the Application of the Exclusion Clauses* 427-429; Hathaway, *The Law of Refugee Status* 214-215. None of these concerns is served by excluding persons who are not criminally culpable.[9]

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[9] In prior briefing, the Government noted that the Convention adopted the definition of "refugee" found in the 1946 Constitution of the International Refugee Organization, which was also referenced by the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009. Br. in Opp. 8-9 (citing *Cardoza-Fonseca*, 480 U.S. at 437-438 & n.20). This observation, though accurate, is irrelevant. The operative Convention provision here is not the general rule governing qualification as a "refugee"—which in several respects paralleled the IRO definition—but rather the limited exceptions to the Convention's application in Article 1F. Those exceptions were the subject of significant independent negotiation during the drafting of the Convention. *See* Hathaway, *The Law of Refugee Status* 214-216, 221-224, 226-229; Goodwin-Gill & McAdam, *The Refugee in International Law* 163-165, 172-173, 184. Accordingly, nothing in the Displaced Persons Act—or this Court's interpretation of it in *Fedorenko*, 449 U.S. 490—bears on the provisions of the Refugee Convention and Protocol at issue here.

Moreover, *Fedorenko* raised no questions of compatibility with a treaty obligation. Here, since Congress has not clearly stated any intent to deviate from the United States' *nonrefoulement* obligation under the Protocol—and indeed has repeatedly stated an intent to comply with it—the Court's well-established approach (*see supra* pp. 18-19) compels a conforming interpretation of the Refugee Act, namely one that takes account of personal culpability.

2. Decisions of other States Parties recognize that coerced conduct does not exclude an applicant under Article 1F

Courts of other States Parties that have considered the issue have recognized that duress provides a defense to disqualification under Article 1F. Indeed, *amici* are unaware of any decision by another State Party that has held (as the BIA and court of appeals did here) that the objective effect of an asylum seeker's conduct was dispositive without regard to personal culpability for the acts in question.

On facts similar to the instant case, the Federal Court of Canada found that an Eritrean citizen conscripted into the Ethiopian army was not subject to exclusion for helping to round up civilians who were later tortured and executed. The Court found Article 1F inapplicable because:

> —the respondent was forcibly recruited into the Ethiopian Army;
>
> —he held no rank other than a mere soldier;
>
> —he did not have any opportunity to leave the army until he was released in late 1988, early 1989;
>
> —he was compelled to do the duties that he was told to do, namely stand guard on people who were being arrested [and whom the applicant knew would later be tortured and/or killed] after having weapons found in their house, and also burying dead bodies;
>
> —a soldier in a similar situation had tried to escape and had been killed;

> —the respondent's evidence and the documentary evidence showed that if the respondent tried to desert, he would have faced severe punishment, including death;
>
> —the respondent left at the first available moment that he could, namely upon his release after serving two years.

Canada v. *Asghedom*, [2001] F.C.T. 972 ¶ 27 (Can. Fed. Ct.). The court held that "the defence of duress and the circumstances of the case can lead to a conclusion that [the alien] is not excluded [under Article 1F(a)] even if he had knowledge of the crimes perpetrated by the army." *Id.* ¶ 28; *see also Ramirez* v. *Minster of Employment & Immigr.*, [1992] 2 F.C. 306, 328 (Can. Fed. Ct. App.) (defense of duress can justify commission of Article 1F(a) crimes, provided the harm avoided by the applicant is greater than the harm actually inflicted on the victim); *Re V.(C.I.)*, [1991] C.R.D.D. No. 461 (Can. Convention Refugee Determination Div.) (holding Article 1F(a) inapplicable to an alien who had committed "murder and torture" on "more than four occasions" because "he was forced by repeated torture and physical harm that he experienced to commit acts that he believed to be wrong and contrary to human dignity" and was "not to be held responsible for his actions").

Decisions in other countries likewise limit the Article 1F(a) bar to culpable conduct. *See, e.g.*, *SRYYY* v. *Minister for Immigr. & Multicultural & Indigenous Affairs* (2005) 147 F.C.R. 1, 35-36 (Austl. Fed. Ct.) ("Article 1F(a) refers to serious reasons for considering that the relevant person 'has committed a crime.' We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve

that person from criminal responsibility."); *Re W97/164 & Minister for Immigr. & Multicultural Affairs* (1998) 51 A.L.D. 432 ¶ 79 (Austl. Admin. App. Trib.) (finding Article 1F inapplicable where alien participated in killings committed by others because "[t]o refuse to do so would almost certainly have drawn strong reprisals, perhaps his own death. To this extent, the concept of coercion, or obedience to higher orders, becomes relevant to the applicant's situation."); *Re VA*, No. 2142/94, at 12 (N.Z. Refugee Status App. Auth. Mar. 20, 1997) (holding Article 1F inapplicable because "the degree of compulsion or duress under which the appellant acted was such that the exclusion principles do not apply"); *Gurung* v. *Secretary of State for Home Dep't* [2002] UKIAT 4870 ¶ 110 (U.K. Immigr. App. Trib.) (noting that "the assessment under Art 1F must take into account … factors such as duress and self-defence against superior orders as well as the availability of a moral choice").[10]

Cases sometimes differ regarding whether to consider duress as an affirmative defense excusing proscribed conduct or as a factor in determining whether the applicant engaged in the conduct with culpable

[10] Although the United States is not party to the Rome Statute of the International Criminal Court (2187 U.N.T.S. 90, *entered into force* July 1, 2002), other countries adhering to that instrument have looked to it as a codification of pre-existing international jurisprudence on the subject of duress. *See, e.g.*, *SRYYY*, 147 F.C.R. at 35. Article 31(1)(d) of the Rome Statute provides that a person shall not be culpable if the person's conduct is caused "by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person," provided that the person acts "necessarily and reasonably" to avoid the threat and that the person did "not intend to cause a greater harm than the one sought to be avoided."

mens rea. *Compare, e.g.*, *R.* v. *Finta*, [1994] 1 S.C.R. 701, 837-838 (Can.) (holding that duress negated the requisite intent for complicity in war crimes), *with SHCB* v. *Minister for Immigr. & Multicultural & Indigenous Affairs* (2003) 133 F.C.R. 561, 568-569 (Austl. Fed. Ct.) (noting availability of obedience to orders under duress as a defense to exclusion, but finding it waived on appeal); *cf. Dixon*, 548 U.S. at 6-7 ("the duress defense … may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself"). Ultimately, as an Australian tribunal put it, "[w]hether the conclusion in this case be reached by reference to principles of accessorial liability, or by reference to the defence of coercion, or through a combination of these, the result will be the same." *W97/164*, 51 A.L.D. 432 ¶ 83. Under either theoretical approach, the practical result is the same: duress is an available defense, and the court of appeals erred in holding to the contrary.

3. Article 1F(a) expressly incorporates international criminal law principles recognizing individual culpability and commonly applicable defenses

Any remaining doubt as to Article 1F(a)'s culpability requirements is extinguished by looking to the background against which it was drafted.

Article 1F(a) provides that the "crimes" that trigger disqualification are those "defined in the international instruments drawn up to make provision in respect of such crimes." This language refers in particular to the foundational documents for the trials of war criminals following the Second World War. Indeed, the three crimes listed in Article 1F(a) are the very crimes

enumerated in the Charter of the International Military Tribunal that sat at Nuremberg, Germany. *See* Charter of the International Military Tribunal art. 6, annexed to London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1556. The Convention's drafters understood that the principles enunciated by post-war military tribunals would apply to exclusion decisions under the Convention. *See* Hathaway, *The Law of Refugee Status* 215-217; Goodwin-Gill & McAdam, *The Refugee in International Law* 163-171; 1 1 Grahl-Madsen, *The Status of Refugees in International Law* 273-276 (1966); Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretations* 66-67.

The post-war tribunals recognized the defenses of duress and necessity as negating individual culpability. In its Judgment, the International Military Tribunal held that, although a defendant was not excused merely because he acted under superior orders, orders that amounted to coercion and deprived the defendant of any "moral choice" could excuse otherwise criminal conduct. *See* I Secretariat of the International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* 224 (1947) ("The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.").

U.S. tribunals sitting in post-war Germany likewise recognized duress and necessity defenses. The tribunal in the *Einsatzgruppen* case stated that "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns…. No court will punish a man who, with a loaded pistol at his head, is compelled

to pull a lethal lever." IV GPO, Case No. 9, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (1950) ("*Nuernberg Trials*") 480; *see also I.G. Farben*, Case No. 6, VIII *Nuernberg Trials* 1176 (duress "is a complete defense where it is given under such circumstances as to afford the one receiving it of no other moral choice than to comply therewith"); *Krupp*, Case No. 10, IX *Nuernberg Trials* 1443 (recognizing a defense where the "act charged was done to avoid an evil both serious and irreparable" and "the remedy was not disproportioned to the evil"); *id.* at 1438 ("[T]he question is to be determined from the standpoint of the honest belief of the particular accused in question .... The effect of the alleged compulsion is to be determined not by objective but by subjective standards."). The tribunals specified, however, that such a defense was unavailable "where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative." *I.G. Farben*, VIII *Nuernberg Trials* 1179; *see also Flick*, Case No. 5, VI *Nuernberg Trials* 1196-1202.

A subsequent United Nations report derived common principles from exhaustive review of over 1900 military tribunal decisions. *See* XV U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* (1949). The report recognized the availability of duress as a defense where: "(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no adequate means of escape; (c) the remedy was not disproportionate to the evil." XV *id.* at 174.

The principles articulated by the post-war tribunals were settled international law by the time of the Refu-

gee Convention's drafting and approval. In 1946, the U.N. General Assembly affirmed the principles recognized by the Charter and Judgment of the International Military Tribunal. G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946). Shortly thereafter, the U.N. International Law Commission (ILC), which reviewed those principles, recognized that a duress defense was well-established. *See Draft Code of Offences Against the Peace and Security of Mankind—Report by J. Spiropoulos, Special Rapporteur*, U.N. Doc A/CN.4/25 at 275 (1950) (noting a duress standard identical to that reported by the U.N. War Crimes Commission). The Convention's history shows that its drafters wrote Article 1F with significant regard for the ILC's ongoing work. *See* 1 Grahl-Madsen, *The Status of Refugees in International Law* 276; Hathaway, *The Law of Refugee Status* 217; Robinson, *Convention Relating to the Status of Refugees* 66-67.

Those who drafted and signed the Refugee Convention were well aware of the importance of a duress defense, even in prosecutions for the most serious crimes. Neither the Convention, nor the Refugee Act that Congress patterned on it, sought to undo that defense. Rather, Convention and Act alike ensure that persons need not suffer return to serious danger solely because they were forced—through credible threats to their own life or safety—to mistreat others.

II. THE CASE SHOULD BE REMANDED FOR THE BIA TO DETERMINE WHETHER THERE IS SUFFICIENT EVIDENCE OF CULPABLE CONDUCT

The statute is clear that the persecutor bars allow return to persecution only if the applicant's own participation in "persecution" was culpable. Although the BIA is afforded deference in its administration of the

INA (*see Aguirre-Aguirre*, 526 U.S. at 424-425), this Court may overrule its action "if we conclude that it is inconsistent with the purposes of the [treaty] or with domestic law." *TWA*, 466 U.S. at 254 n.26. Put differently, the BIA may not abrogate U.S. treaty obligations or construe the persecutor bars contrary to Congress's clear intent. As detailed above, the BIA's decision in this case (affirmed by the court of appeals) did both.

The Court granted certiorari to determine whether a persecutor bar "prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution." Pet. i. The answer to that narrow legal question is no. That question, however, is "quite different from the question of interpretation that arises in each case in which the agency is required to apply" a persecutor bar to a given set of facts. *Cardoza-Fonseca*, 480 U.S. at 448. Although culpability is an unquestionable requirement of the persecutor bars, the task of articulating the particular standards under which that requirement is to be considered is a matter best left to the agency in the first instance, as is their application to the facts of the instant case. *See id.*

At the very least, however, the Convention and Protocol (and therefore the INA) require the persecutor bars to be applied in conformity with the well-established standards prevailing at the time the Convention was concluded—the standards understood by the drafters and the Contracting States. Accordingly, an applicant may not be held ineligible for relief where "(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no adequate means of escape; (c) the remedy was not dis-

proportionate to the evil." XV U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* 174. Of course, it would be open to the BIA on remand to interpret the INA and the Protocol more favorably to an applicant, but the foregoing interpretation—compelled by the Convention's text, drafting history, state practice, and international criminal law antecedents—is the minimum standard required. That is a sufficient basis to reverse the court of appeals' judgment in this case, which did not permit consideration of culpability at all.

Accordingly, the Court should remand this case with instructions that the BIA consider the Petitioner's individual culpability under a legal standard consistent with U.S. obligations under the Refugee Protocol.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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